Supreme Court, U.S.
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No. 91-1241

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

JOHN E. SHIMOTA and NAN B. SHIMOTA,
Petitioners,

v.

THE UNITED STATES,
Respondent.

REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

Shimota v. United States, 943 F.2d 1312 (Fed. Cir. 1991)

Shimota v. United States, 21 Cl. Ct. 510 (1990)

PRELIMINARY STATEMENT

Respondent filed a Brief in Opposition to the Petition for Writ of Certiorari in the above-captioned matter on March 30, 1992. Respondent's Brief raises two matters that require reply. Specifically, Respondent characterizes the lower courts' opinion as thorough and well-reasoned, but offers no persuasive explanation for its reliance on a regulation that has been superceded by a subsequent statutory enact-

ment. (Respondent's Brief 4) Respondent further argues that certain arguments advanced by Petitioners were first raised on appeal. (Respondent's Brief 10)

This reply is submitted in accordance with Rule 15.6 of the Rules of the Supreme Court of the United States.

I. PETITIONERS PROPERLY ARGUED THAT THE STATUTORY SEPARATE CONTRACT DOCTRINE SUPERCEDED THE SINGLE CONTRACT DOCTRINE AND THE LOWER COURT ERRONEOUSLY FAILED TO ADDRESS THIS MATTER

Respondent asserted that this Court should deny the Petition because, in part, the lower courts' decisions were "thorough and well-reasoned." (Respondent's Brief 4) Respondent cited *Guilzon v. Commissioner*, 97 T.C. 237 (1991), *appeal docketed*, No. 92-4229 (5th Cir. March 9, 1992), a case in which the Tax Court considered an identical issue and adopted the Claims Court's[1] findings in the present case.

A key finding in the Claims Court's opinion was its conclusion that Reg. §1.72-2(a)(3)(i)[2] provided that all distributions or payments attributable to a separate program of interrelated contributions and benefits are considered as received under a single contract. Thus, it concluded that the lump sum payment and monthly annuity paid to John Shimota under the Civil Service Retirement System (CSRS) were from a single contract. This conclusion ignored the

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[1] Counsel for Petitioners in this matter also serve as counsel for the taxpayers in *Guilzon*.

[2] All references to "Reg." refer to the Treasury Regulations at 26 Code of Federal Regulations.

impact of the separate contract doctrine embodied in new Code § 72(d)[3], and amended Code § 414(k) on the issues in this case. Both of these provisions were added to the Tax Code by the Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085 ("Tax Reform Act of 1986") and the Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, 102 Stat. 3342 ("TAMRA").

While the Claims Court relied upon the reasons for repeal of the basis recovery rule of prior Code § 72(d)[4], it ignored the statutory provision which replaced it, the separate contract rule of the new Code § 72(d). The issues in this case cannot be properly resolved unless the relationship between the statutory separate contract doctrine of Code §§ 72(d) and 414(k) and the regulatory single contract doctrine of Reg. § 1.72-2(a)(3)(i) are examined and addressed. Neither the Claims Court nor the Federal Circuit has considered this matter. As a result of this glaring oversight, the lower courts' opinions can hardly be characterized as "thorough." Petitioners' position with respect to this matter is discussed in detail in its Petition at pages 9-17.

Respondent further asserts that Petitioners raised the "separate contract" argument for the first time

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[3] All references to "Code" or "Tax Code" refer to the Internal Revenue Code of 1986, as amended, 26 United States Code. New Code § 72(d) refers to the provision added in 1988 but made effective as of the date of enactment of the Internal Revenue Code of 1986.

[4] The basis recovery rule of prior Code § 72(d) was part of the Internal Revenue Code of 1954, as amended and was replaced by a new § 72(d) in the Tax Reform Act of 1986 and TAMRA.

in their Reply Brief filed with the Federal Circuit. (Respondent's Brief 10) A review of the initial motion for summary judgment in the Claims Court demonstrates that this contention is incorrect. Conversely, if the argument had been raised for the first time on appeal, the appellate court could have readily disposed of Petitioners' argument on that basis. It did not do so. Rather, it affirmed a decision based on a regulation which had not been revised to reflect subsequent statutory enactments.

Petitioners contend that, at a minimum, this Court should remand this matter to the Court of Appeals to address the impact of Code § 414 (k) and Code § 72(d) on the issues in this case. If the appellate court concludes that Petitioners' separate contract argument was raised for the first time on appeal, it will undoubtedly reject this argument. If it concludes that the argument was properly raised, however, it should be directed to examine the merits of the respective positions regarding the separate contract doctrine.

CONCLUSION

Based on the positions advanced in the Petition For Writ of Certiorari and in this Reply, Petitioners respectfully request that the Court grant a Writ of Certiorari. Alternatively, Petitioners respectfully request that the Court remand this matter to the Court of Appeals for the Federal Circuit with direction to address the impact of the separate contract doctrine on the issues in this case.

Respectfully submitted,

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